

Respondent objects to the Order, claiming that the Administrative Law Judge failed to address any of the above listed issues, with the Order merely authorizing Stephen Reintjes, M.D., as the treating physician.

The Administrative Law Judge made no comment in the Order regarding any of the above issues. However, the fact that the Administrative Law Judge awarded claimant benefits from American, with Dr. Reintjes as the authorized treating physician, implies that the Administrative Law Judge found in claimant's favor regarding the above issues. It is with that implied understanding that the Appeals Board proceeds.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary evidence filed herein, the Appeals Board finds, for preliminary hearing purposes, as follows:

Claimant suffered accidental injury on August 30, 1999, when he tripped over a piece of wire mesh, injuring his low back and right leg. This accident occurred at approximately 9:00 a.m., after claimant began working at some time between 3:00 a.m. and 4:00 a.m.

The dispute does not center around whether claimant suffered an accident but rather whom claimant was employed by on the date of accident.

Whether claimant's accidental injury arose out of and in the course of his employment with respondent depends upon whether, on the date of accident, claimant was an employee of respondent or an employee of Associated Concrete, Inc.

Several months before, claimant had hired on with respondent, American Curb & Flatwork (hereinafter "American"), as a laborer. American was owned by Gene Lewis. His wife, Brenda Lewis, was the secretary for American. American also employed Jeffrey Lewis, the son of Gene and Brenda. Jeffrey Lewis was also co-owner, with George Goellner, of Associated Concrete, Inc., a separate corporation. According to the evidence in the record, claimant hired on with American but, as was the same with other employees, if American ran out of work, certain employees would be transferred to Associated Concrete, Inc., in order to keep the employees busy.

In this instance, claimant worked for American through August 28, 1999. He was paid through August 28, 1999, but his actual last day of work was August 27, 1999. Respondent alleges that, when claimant reported to work on Monday, August 30, 1999, he was advised by Jeffrey Lewis that he was working for Associated Concrete, Inc.. Claimant denies that this conversation occurred. Claimant testified he had never heard of Associated Concrete, Inc., had never filled out any paperwork such as W-2 forms or other federal forms, and was unaware that his employment was switched from American to Associated Concrete, Inc., on the date of accident.

Respondent provided the testimony of George Goellner, Brenda Lewis and Jeffrey Lewis. All three testified that, on the date of accident, claimant was working for Associated Concrete, Inc., rather than American. Respondent also provided a pay stub from American

showing claimant's pay period ending August 28, 1999. The federal tax information provided by respondent verified that claimant was paid no additional sums by American after August 28, 1999. Respondent also provided a pay stub from Associated Concrete, Inc., showing that, for the week ending September 3, 1999, claimant was paid for his work by Associated Concrete, Inc.

It is undisputed that claimant's injury occurred in Missouri. However, claimant originally worked for American over 80 percent of the time in Kansas. If claimant worked for Associated Concrete, Inc., on the date of accident, that would have been his only date of employment for Associated Concrete, Inc.

When claimant applied for work with American, the paperwork completed at the time of his hire was prepared in Kansas City, Missouri.

Jeffrey Lewis also testified that Associated Concrete, Inc., had workers' compensation coverage available and the workers' compensation carrier had agreed to provide benefits to claimant for the injuries suffered on August 30, 1999.

In workers' compensation litigation, it is claimant's burden to prove his or her entitlement to benefits by proving the various conditions upon which his or her right depends by a preponderance of the credible evidence. See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

On Friday, August 27, 1999, claimant was working for respondent, American, at a place called the caves. Respondent represents that, when claimant reported to work on Monday, August 30, 1999, he and other employees of American were transferred to Associated Concrete, Inc., in the caves, as respondent, American, did not have enough work to keep claimant and others busy. Respondent's corporate secretary, Brenda Lewis, testified that this was a common practice between the two companies, as her son, Jeffrey, who worked for American, was co-owner of Associated Concrete, Inc. This practice was beneficial to both the companies and the employees, as the companies did not have employees standing around with nothing to do and the employees did not miss work and thus were guaranteed a more steady paycheck.

Jeffrey Lewis testified that he advised claimant that he was working for Associated Concrete, Inc., on that date, but claimant has no recollection of that conversation. Claimant testified that he was surprised his paycheck came from Associated.

A review of claimant's employment records shows claimant's pay for the year 1999 was consistently from American, with the only check written by Associated Concrete, Inc., being the one for the week ending September 3, 1999, which would include the August 30, 1999, date of accident.

The evidence that claimant was employed by Associated Concrete, Inc., on the date of accident is uncontradicted, except for claimant's testimony that he was unaware of ever having been employed by Associated Concrete, Inc., and had never filled out any paperwork connected with any employment with Associated Concrete, Inc.

Respondent testified that transferring employees was a common practice and employees other than claimant had also been transferred on that date. Respondent also provided wage and tax information verifying that claimant's last date of employment, where he was paid by American, was August 28, 1999. Respondent did acknowledge that claimant continued as an employee of American. However, he had been transferred over to Associated Concrete, Inc., to work on August 30, 1999, because respondent, American, did not have enough work to keep claimant and the others busy on that date.

Associated Concrete, Inc., acknowledges having workers' compensation coverage in place on that date for claimant and has agreed to provide same.

The Appeals Board finds the evidence supports respondent's contention that claimant was not an employee of American on the date of accident but was, instead, an employee of Associated Concrete, Inc. Therefore, the Order of the Administrative Law Judge, granting claimant medical benefits with Dr. Reintjes as the authorized treating physician, is reversed. Costs, however, are taxed against the respondent and its insurance carrier per the Order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Steven J. Howard dated April 5, 2000, should be, and is hereby, reversed. The costs of this proceeding are assessed against the respondent and its insurance company.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

c: Davy C. Walker, Kansas City, KS
Donald J. Fritschie, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director